of a party under the circumstances therein specified, but establishes a new rule which would entirely exclude account books as well as other testimony of the plaintiff. Such, however, has not been the construction in other jurisdictions having similar provisions.[10]

G. B. W.

GIFTS INTER VIVOS AND MORTIS CAUSA: DELIVERY OF THE KEY OF A SAFE DEPOSIT BOX AS SUFFICIENT DELIVERY OF THE CONTENTS.—A gift inter vivos contemplates an immediate and absolute transfer of property from the donor to the donee. A gift mortis causa, on the other hand, must be made in expectancy of death, and, while contemplating an immediate transfer of property, is not absolute until the death of the donor, his recovery or a revocation before his death acting as a condition subsequent, revesting the property in him.[1] The authorities make no other distinction between these two classes of gifts, the requirements for their validity being regarded as substantially the same.[2] In order to constitute a valid gift there must be an unmistakable intent upon the part of the donor to make the gift, and, as a necessary means of carrying into effect this intention, there must be a delivery of the subject matter to the donee or to a third party as his agent.[3]

The question as to what constitutes sufficient delivery has been frequently passed on by the courts. In both classes of gifts, actual delivery of the thing given is of course sufficient. Upon the question as to whether or not in the case of gifts mortis causa anything short of manual tradition amounts to a valid delivery, the authorities are not in accord. Since these gifts come into question only after the donor's death, affording in consequence much opportunity for fraud and perjury, a few courts, adopting the strict language of Ward v. Turner,[4] have thought to avoid these dangers by requiring actual delivery, except where the nature of the property will not admit of physical tradition.[5] Under this narrow view the delivery of a key of a safe deposit box would not constitute sufficient delivery of its contents. The more liberal view and that generally approved regards the test of sufficiency of delivery in gifts mortis causa to be identical with that in the case of gifts inter vivos.[6] Actual physical delivery must be made when practicable, but constructive delivery is sufficient when the nature or location of the subject matter is such that actual delivery cannot be made, or

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[10] Chamberlayne, § 3084.

[1] Emery v. Clough (1886), 53 N. H. 556, 4 Atl. 796, 798, 56 Am. Rep. 543.

[2] Stout v. McNab (1910), 157 Cal. 356, 107 Pac. 1005.

[3] Collins v. Maude (1904), 144 Cal. 289, 77 Pac. 495.

[4] (1752), 2 Ves. 431.

[5] Keepers v. Fidelity Co. (1893), 56 N. J. Law 302, 28 Atl. 585, 23 L. R. A. 184, 44 Am. St. Rep. 397.

[6] Basket v. Hassell (1882), 107 U. S. 602, 2 Sup. Ct. Rep. 415, 27 L. Ed. 500.

where existing conditions are such that physical delivery would be impracticable.[7] There must be more than the performance of a symbolic act. The delivery must be such as to terminate the donor's custody and control and place the subject matter wholly in the donee's power, enabling him without further act on the donor's part to reduce it to his manual possession.[8] The delivery of the key to a safe deposit box would accordingly be sufficient constructive delivery,[9] constituting, if accompanied by the intention to make a gift, a valid immediate transfer of the property.[10] The necessity of the assistance of the safe deposit company and the master key retained by it in order to open the box has not been regarded as affecting the sufficiency of delivery.[11] Rules and regulations for obtaining access to the box are for the protection of the company and the depositor against fraud. As in the case of such provisions necessary for the withdrawal of deposits from savings banks,[12] so in this instance, a non-compliance with these rules should not vitiate the sufficiency of delivery between donor and donee. The safe deposit company may always protect itself in doubtful cases by interpleading. This means of delivery seems logical and consonant with our modern customs and usages. The courts may prevent fraud by a more careful scrutiny of the evidence as to the donor's actual intent.

The facts in a recent Washington case, *Newsome v. Allen*,[13] illustrate the application of this relaxed rule. The donor and donee went into the vault of the safe deposit company and the donor, after having taken out the box, examined its contents, and replaced it, gave the key to the donee saying she was going to be operated on, and that she desired the donee to have the contents in case she died. Since the subject matter was susceptible of immediate delivery and no reason appeared why such manual delivery could not have been made, the court held that there was not sufficient delivery. The decision seems in accord with the liberal view.[14]

The instant case suggests two further situations. First, where the donor and another are joint tenants in the safe deposit box, and

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[7] Knight v. Tripp (1898), 121 Cal. 674, 54 Pac. 267, and cases cited post, note 10.

[8] Hart v. Ketchum (1898), 121 Cal. 426, 53 Pac. 491.

[9] Thomas v. Lamb (1909), 11 Cal. App. 717, 106 Pac. 254.

[10] People v. Benson (1901), 99 Ill. App. 325; Foley v. Harrison (1911) 223 Mo. 460, 136 S. W. 354; Herrick v. Dennis (1909), 203 Mass. 17, 89 N. E. 141 (inter vivos).

[11] Foley v. Harrison (1913), 206 Fed. 57.

[12] Candee v. Conn. Sav. Bk. (1908), 81 Conn. 372, 71 Atl. 552, 22 L. R. A. (N. S.) 568; Fisher v. Ludwig (1907), 6 Cal. App. 144, 149, 91 Pac. 568.

[13] (Wash., Aug. 16, 1915), 151 Pac. 111.

[14] Besides insufficiency of delivery the language by the donor did not indicate clearly an intention to make a present gift.

second, where both the donor and the donee have access to the box. In the latter case unless the donor gives up his means of access, the key, delivery is incomplete.[15] In the former case the sufficiency of delivery should not be affected by the fact that another than the donor has access to the box, provided the donor gives to the donee his means of access to it.[16]

R. C. F.

INSURANCE: MISREPRESENTATION: LIMITATION ON BINDING EFFECT OF INFORMATION GAINED BY AGENT.—In making application for insurance on his life the insured signed the following form: "Whenever nothing is written in the following paragraph it is agreed that the declaration is true without exception. . . . . (2) I have never had any of the following complaints or diseases: Apoplexy—Fits or Convulsions, etc., except—" Here follows a blank space in which exceptions were to be noted and which contained the printed words "I have stated all exceptions." Since no exception was entered above insured's signature there arose a breach of material warranty, inasmuch as he knew himself to be subject to recurring fits and convulsions.

In *Westphall v. Metropolitan Life Insurance Company*[1] the insured set up as a defense to the breach of warranty that the company's medical examiner had gained information regarding the insured's health which he had failed to insert in the application. This brought before the court the question of the validity of the following limitation upon the liability of the insurer for the uncommunicated knowledge of his agent: "Inasmuch as only the officers of the company have authority to determine whether a policy shall issue upon the application and as they act on the written statements herein made, no information given by or to the company's agent shall be binding upon the company unless communicated to the officers." The court upheld the validity of the limitation and thereupon excluded, as falling within its terms, evidence offered by the plaintiff tending to show that the medical examiner in performing his duties had learned that the insured was subject to epilepsy and had failed to communicate the same to the company. The validity of the same or a similar limitation upon the principal's liability for the knowledge of his agent has been upheld in this[2] and other states[3]

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[15] Bauerschmidt v. Bauerschmidt (1903), 97 Md. 35, 54 Atl. 637; Contra, Gilkinson v. Third Ave. R. R. Co. (1900), 47 App. Div. 472, 63 N. Y. Supp. 792. See also Page v. Lewis (1892), 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170.

[16] The language in the principal case seems contra.

[1] (June 23, 1915), 21 Cal. App. Dec. 4, 151 Pac. 159.

[2] Iverson v. Metropolitan Life Ins. Co. (1907), 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866, is the leading California case, citing New York Life v. Fletcher (1886), 117 U. S. 519, 29 L. Ed. 934, 6 Sup. Ct. Rep. 837; Northern Ass. Co. v. Bldg. Ass'n. (1902), 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133, based on parol evidence rule. Accord, Madsen v. Maryland Casualty Co. (1914), 168 Cal. 204, 142 Pac. 51.

[3] Haapa v. Metropolitan Life Ins. Co. (1907), 150 Mich. 467, 114